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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 367

DONALD L. ATKINS, - - - - - *Petitioner,*

v.

SCHMUTZ MANUFACTURING COMPANY, INC., - - - - - - - *Respondent.*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Schmutz Manufacturing Company, Inc., Respondent herein, prays that the request for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on February 16, 1967, be denied.

I. CITATION TO OPINIONS BELOW.

The order and opinion of the District Court is unreported and is printed in Petitioner's Appendix "B", pages 2-5. The opinion of the United States Court of

Appeals for the Sixth Circuit is also printed in Petitioner's Appendix "B", pages 5-9 and is reported as *Atkins* v. *Schmutz Manufacturing Company, Inc.* (C.A., 6th), 372 F. 2d 762.

II. JURISDICTION.

The jurisdiction of this Court is sought pursuant to the provisions of *28 USCA 1254(1)*.

III. QUESTIONS PRESENTED.

1. Did the District Court and the Circuit Court of Appeals correctly apply Erie Railroad Company v. Tompkins, 304 U. S. 64; Guaranty Trust Company v. York, 326 U. S. 99; and Wells v. Simonds Abrasive Company, 345 U. S. 514 in holding the Kentucky Statute of Limitations of one year applies to a personal injury action brought in 1963 in Kentucky, rather than the two-year Virginia Statute of Limitations where the personal injury occurred since, in 1942, KRS 413.320 had been amended changing the Kentucky law as to which Statute of Limitations applied in the Kentucky courts when the action arose outside of Kentucky?
2. Since this action, if brought in the Kentucky state courts, would have been dismissed because of the application of Kentucky one-year Statute of Limitations rather than the two-year Virginia Statute of Limitations, did the Trial Court, in dismissing the action, and the Circuit Court of Appeals, in affirming the decision of the District Court, correctly apply Erie Railroad Company

v. Tompkins, 304 U. S. 64; Guaranty Trust Company v. York, 326 U. S. 99; and Wells v. Simonds Abrasive Company, 345 U. S. 514?

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Kentucky statutes involved are *Section 2542 of Carroll's Kentucky* statutes in effect prior to 1942 and *KRS 413.320* which was amended and reenacted in 1942, and *KRS 413.140. Section 8-24 (4) of the Code of Virginia* is involved. *Section 2542 of Carroll's Kentucky Statutes* in effect in 1942 is printed at page 3 of Petitioner's brief. The remaining statutes are printed in Appendix "A" 1 and 2 of Petitioner's brief. Petitioner maintains that the *Fifth and Fourteenth Amendments of the Constitution of the United States* are involved, which Respondent denies, but same are printed in Petitioner's Appendix "A" 1.

V. COUNTER-STATEMENT OF CASE.

Donald Atkins was injured in the state of Virginia while an employee of United States Plywood Company on June 22, 1961, according to the allegations of his complaint (R. 5a). The injury occurred, according to the Complaint, in South Boston, Virginia (R. 4a). The Complaint alleged that the defendant, Schmutz Manufacturing Company, was negligent in the design, construction and manufacture of the machinery sold to the United States Plywood Company (R. 7a). Atkins was injured while working in Virginia by a machine manufactured by Schmutz and shipped to Virginia, and

sold to Atkins' employer. Schmutz Manufacturing Company of Louisville, Kentucky, was not doing business in Virginia and was not amenable to service of process in Virginia.

To the complaint; Schmutz Manufacturing Company prayed, among other defenses (R. 8a), as follows:

> "Defendant says that plaintiff was injured in an accident which occurred in South Boston, Virginia, on or about June 22, 1961; that this suit was filed on or about June 19, 1963. More than one year expired from the date of injury before the suit was filed, and it is, therefore, barred by limitation. Defendant pleads and relies upon the Statute of Limitations as a complete bar to plaintiff's cause of action."

Atkins filed his action in the United States District Court for the Western District of Kentucky at Louisville on June 19, 1963 (Petitioner's Appendix 10). Summons was not served upon the Schmutz Manufacturing Company until June 26, 1963 (Petitioner's Appendix 10). Thus, 23 months and 30 days had lapsed since the date of injury before the filing of the suit.

Kentucky Revised Statute 413.140 is as follows:

> "The following action shall be commenced within one year after the cause of action accrues:
>
> "(a) An action for an injury to the person of the plaintiff . . ."

Prior to the year 1942, Carroll's Kentucky Statutes, Section 2542 provided as follows:

> "When a cause of action has arisen in another state or country between residents of such state or country or between them and residents of another state or country, and by the laws of the state or country, the cause of action accrue, an action cannot be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this state."

In 1942, the above Statute was amended and reenacted as KRS 413.320 as follows:

> "When a cause of action has arisen in another state or country, and by the laws of the state or country where the cause of action accrue the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, than said action shall be barred in this state at the expiration of the shorter period."

As to KRS 413.320 as amended in 1942, no decision had been rendered by the Court of Appeals of Kentucky at the time the suit was filed. Although United States District Court Judges, in interpreting this 1942 statute, constantly held that the one year Statute of Limitations applied in this type of case, the Sixth Circuit mistakenly held otherwise. In 1965, while this case was pending in the District Court, the Kentucky Court of Appeals decided *Seat* v. *Eastern Greyhound Lines, Inc.*, Ky., 389 S. W. 2d 908 wherein it stated in a case in all fours with the facts of this case that the Kentucky Statute of Limitations of one year would apply. Also, in 1965, the Kentucky Court of Appeals

decided *Wethington* v. *Griggs,* Ky., 392 S. W. 2d 56 in which the *Seat* case, *supra,* was reaffirmed, and the Kentucky Statute of Limitations of one year was applied in this situation. In both the *Seat* case and in the *Wethington* case, the decisions were retroactive as well as prospective. In the *Seat* case, *supra,* page 909, the Kentucky Court of Appeals refused to follow the decisions of the Sixth Circuit, interpreting as a matter of first impression KRS 413.320 to the effect that the foreign longer Statute of Limitations would not apply to an action brought in Kentucky in this situation. In the same case, the Kentucky Court of Appeals, in order that there be no question about the matter, overruled all of the Kentucky decisions which the United States Court of Appeals for the Sixth Circuit had been relying upon even though all of these decisions were prior to 1942, and decided, under Section 2542, Carroll's Kentucky Statutes, which had been repealed.

The *Seat* and *Wethington* decisions were not unexpected. Warning signals had been flying for a long period of time. In 1952, in *Ley* v. *Simmons,* Ky., 249 S. W. 2d 808, 809, the Kentucky Court of Appeals held that an action in Kentucky to enforce a Florida judgment was barred by the Kentucky limitations though such an action would not have been barred by the Florida Statute of Limitations. In discussing the problem, KRS 413.320 was discussed and to most Kentucky lawyers and Judges, it was apparent that the Kentucky Court of Appeals would hold to the same effect as to KRS 413.320. So that there would be no mistake about the matter, Judge Brooks, a long practicing

Kentucky lawyer, who is Judge of the U. S. District Court for the Western District at Louisville, stated in *Albanese* v. *Ohio River-Frankfort Cooperage Co.* (W. D., Ky.), 125 F. Supp. 333, 335 as follows:

> "Although I may be satisfied that when the Court of Appeals of Kentucky is called upon to construe KRS 413.320, that it will embrace the general rule prevailing in the other forty-seven states that limitations of actions are controlled by the law of the forum, I cannot presume to anticipate such a ruling."

Thus, while Judge Brooks reasoned the prior rulings of the Sixth Circuit did not correctly interpret the Kentucky law, he felt, under his obligation, as a Federal Judge, that he was bound to follow the Sixth Circuit opinions. Yet, this warning clearly anticipated what the Kentucky Court of Appeals would rule, and such a ruling was made in the *Seat* and *Wethington* cases. The Sixth Circuit had simply misconstrued the Kentucky law in applying the Kentucky Court of Appeals decisions to KRS 413.320 which were handed down prior to its amendment and enactment in 1942. The Sixth Circuit simply made a mistake as to Kentucky law in view of the fact that there was no decision on the statute as amended after 1942 by the Kentucky Court of Appeals. When the opinion appeared, the Kentucky Court of Appeals, in the *Seat* and *Wethington* cases, declared the law without equivocation in accordance with Judge Brook's anticipation in the *Albanese* case as early as 1954. Thus, the Petitioner in

this action, when he filed this case in Kentucky, had ample reason to know that he was doing so at his own risk and that the Judges in U. S. District Courts in Kentucky felt that the Kentucky Court of Appeals would not follow the Sixth Circuit decisions and that the Sixth Circuit decisions were wrong as far as Kentucky law applied.

The Trial Court in 1965 and the Circuit Court of Appeals, in 1967, in applying *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817 in statute of limitations and conflict of laws questions in accordance with *Wells* v. *Simonds Abrasive Company,* 345 U. S. 514 and *Guaranty Trust Company* v. *York,* 326 U. S. 99, sustained the dismissal of the Petition on the basis that the Kentucky law, as declared in the *Seat* and *Wethington* cases, required that the law as to limitations of the forum (Kentucky), be applied and not the law of Virginia. Since the statute of limitations in Kentucky was one year pursuant to the Kentucky Statutes, it was applied as a law of the forum, and the actions dismissed. This Petitioner has been treated no different than any other petitioner in the handling of this case. As noted by the Court of Appeals for the Sixth Circuit (appellant's Appendix 8):

> "If the complaint in the present case had been filed in a State court of Kentucky more than one year after the cause of action arose, it would have been barred by the Kentucky one-year statute of limitations, under the 1942 revision of KRS 413.320 as interpreted by the Kentucky Court of Appeals, Wethington v. Griggs, supra, 392 S. W.

2d 56. The same result must be reached by this court in a diversity case arising in Kentucky. Woods v. Interstate Realty Co., 337 U. S. 535; Angel v. Bullington, 330 U. S. 183."

The Respondent acknowledges that a new action has been filed in the U. S. District Court of Virginia, Danville division, and that a copy of the Opinion of the Court dismissing the Complaint under the Virginia law is correctly quoted entitled Donald T. Atkins, plaintiff v. Schmutz Manufacturing Company, Inc., at page 14 of the Petitioner's Appendix.

VI. ARGUMENT.

In its Petition, the Petitioner does not argue that the law of Kentucky as set forth in *Seat* v. *Eastern Greyhound Lines, supra,* and in *Wethington* v. *Griggs, supra,* to the effect that KRS 413.320 does not require the Kentucky courts to apply the Virginia two-year statute of limitations rather than the law of the forum, which would be the Kentucky one-year statute of limitations; nor does he deny that the foregoing Kentucky decisions apply the law to cases filed prior to the decisions being made. There was no decision in Kentucky on this point since the amendment of KRS 413.320 in 1942. The cases dealing with the prior statute, Carroll's Kentucky Statutes 2542, *Gibson* v. *Womack,* 291 S. W. 1021 (Ky., 1927); *Smith* v. *Baltimore & O. Ry. Co.,* 162 S. W. 564 (Ky., 1914); *John Shillito Co.* v. *Richardson,* 42 S. W. 847 (Ky., 1897); *Labatt* v. *Smith,* 83 Ky. 599, were all overruled in the *Seat* case,

supra, 910. In the *Seat* case, the Court specifically noted that all of these cases were decided before KRS 413.320 was amended and reenacted in 1942, and specifically pointed out that its present decision in the *Seat* case was in line with *Ley* v. *Simmons,* Ky., 249 S. W. 2d 808, which was decided in 1952. Upon these cases, which were made the law no longer by the amendment in 1942 of KRS 413.320, and upon reliance on these cases in contra-distinction to the opinion of Judge Shelbourne, the Kentucky U. S. District Judge, *Burton* v. *Miller* (C. A., 6th), 185 F. 2d 817 was decided. Again, after the decision in *Ley* v. *Simmons,* the case of *Koeppe* v. *Great Atlantic & Pacific Tea Co.* (C. A., 6th), 250 F. 2d 270 was brought before the Sixth Circuit. The Kentucky District Judge, the Hon. Mac Swinford, was reversed. Judge Swinford had concluded that the Kentucky Court of Appeals decision in *Ley* v. *Simmons,* Ky., 249 S. W. 2d 808 and *Mutual Trust and Deposit Co.* v. *Boone,* Ky., 267 S. W. 2d 751 required that the Kentucky Statute of Limitations of one year as the law of the forum be applied rather than a two-year statute of limitations the foreign jurisdiction in a personal injury accident. The Sixth Circuit did not follow the Kentucky District Judge and again erroneously interpreted KRS 413.320. Judge Brooks, another U. S. District Judge, in 1954, in *Albanese* v. *Ohio River-Frankfort Cooperage Co.* (W.D., Ky.), 125 F. Supp. 333, 335, followed the rulings of the Sixth Circuit but did so only because of his obligations, reciting that he felt satisfied that when the Kentucky Court of Appeals is called upon to construe KRS 413.320, it would

not follow the Sixth Circuit decisions and would follow the rule prevailing in the other forty-seven states that limitations of actions in this situation are controlled by the law of the forum. The Sixth Circuit was amply warned by the District Judges in Kentucky that its decisions were erroneous and any lawyer examining the decisions would have so found. The Sixth Circuit did not follow the rules set down by this Court that in cases where there was no decision by a state court of last resort upon a matter, it should follow the ruling of the district court learned in the law of that state. *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280, 62 S. Ct. 607; *Rudd-Melikian* v. *Merritt* (C. A., 6th), 282 F. 2d 924, 929; *In re Glassman.* (C. A., 6th), 261 F. 2d 914, 915; *Lee Shops, Inc.* v. *Schatten-Cypress Co.* (C. A., 6th), 350 F. 2d 12, 17.

The petition does not dispute that the law of Kentucky requires the law of the forum to be utilized but states that since the Federal Court, namely, the Sixth Circuit, has continuously misconstrued the law and that it has relied upon such misconstruction, that this case should not be decided on the law of Kentucky as it has existed since 1942 under the existing statute.

This Court, in *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 61 S. Ct. 347, 85 L. Ed. 324, decided the question before the Court in this case. Vandenbark brought a suit in the Federal District Court in Ohio to recover for occupational diseases allegedly contracted while in the employ of the glass company. Jurisdiction was based on diversity. The District Court granted a Motion to Dismiss on the ground that

the petition failed to state a cause of action under Ohio law. Thereafter, two changes in Ohio law occurred: previous judicial decisions construing the Workmen's Compensation Act as to compensability for occupational diseases were expressly overruled; the Act itself was amended to include expressly a disease which Vandenbark claimed he had contracted while in the company's employ. These changes in state law were urged on appeal as requiring reversal of the District Court's judgment on the basis that under the *Erie* case, *supra*, the subsequent state decision was the law of the state and was binding on the federal courts. The Court of Appeals affirmed the District Court, holding that a state decision rendered after the judgment of the Federal District Court cannot be given retroactive effect, and therefore the judgment of the District Court, right when made, would not be reversed because of an intervening change in the state law (C. A., 6th), 110 F. 2d 310. The Supreme Court reversed on the ground that the duty rests on the Federal Court to apply state law under the "Rules of Decisions" Statute in accordance with the then controlling decision of the high state court. This court then quoted *United States* v. *Schooner Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49 as follows:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied."

This Court went on to cite specific situations as follows:

> "Kibbe v. Ditto and Moores v. Citizens' National Bank hold that subsequent decisions as to married women's rights control review. Sioux County v. National Surety Company gives effect to a later decision on a statute as to surety bonds. In Oklahoma Packing Company v. Oklahoma Gas Company, we applied as determinative a state decision, clarifying the local law, handed down after the decree then under consideration here.
>
> "[3] While cases were pending here on review, this Court has acted to give opportunity for the application by the lower courts of statutes enacted after their judgments or decrees. It has vacated judgments of state courts because of contrary intervening decisions, and has accepted jurisdiction by virtue of statutes enacted after cases were pending before it. Where, after judgment below, a declaration of war changed the standing of one litigant from an alien belligerent to an enemy, this Court took cognizance of the change and modified the action below because of the new status. Similarly repeal of criminal laws or of a constitutional provision without a saving clause deprives appellate courts of jurisdiction to entertain further proceedings under their sanctions. These instances indicate that the dominant principle is that nisi prius and appellate tribunals alike should conform their orders to the state law of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered."

To the same effect see *Jones* v. *Schellenberger* (C. A. 7th), 225 F. 2d 784, 791, cert. denied 350 U. S. 989.

As illustrated in the *Seat* case, *supra,* and *Wethington* case, *supra,* decisions have been applied by the Kentucky Court retroactively as well as prospectively. Under the rule announced in the *Vandenbark* case, the District Court correctly applied the Kentucky law for where the state courts apply intervening changes of law, the Federal Court should be required to so do. *1 A Moore's Federal Practice,* Section 0.307 (3) pages 3314-3319. See also *Connor* v. *New York Times Company* (C. A., 5th), 310 F. 2d 133, 135.

Upon this problem, United States Court of Appeals for the Sixth Circuit correctly analyzed the situation and applied the law of Kentucky at the time the U. S. District Court rendered its decision. The Court stated as follows at page 764:

> "Appellant urges that Seat v. Eastern Greyhound Lines should be applied only prospectively. Unfortunately for appellant, the Kentucky Court of Appeals applied this decision retroactively in Wethington v. Griggs, 392 S. W. 2d 56. The Wethington case arose out of an automobile accident which occurred in Ohio on March 15, 1962. Ohio had a two-year statute of limitations. The action was filed in Kentucky more than one year after the date of the accident, but before the Ohio two-year statute would have run. Applying the law of the forum, the Kentucky court held that the action was brought too late and was barred by the one-year statute of limitations.

"[1] In diversity cases the law of the State in which a federal court sits must be followed with respect to the statute of limitations, Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, rehearing denied, 326 U. S. 806, 66 S. Ct. 7, 90 L. Ed. 491, and conflicts of laws, Klaxon Co. v. Stentor Electric Manufacturing Co., Inc., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477. Speaking for the Court in Guaranty Trust Co. v. York, Mr. Justice Frankfurter said:

" 'Erie R. Co. v. Tompkins, [304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188] was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between state and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding "substance" and "procedure," we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, Cities Service Co. v. Dunlap, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196, as to conflict of laws, Klaxon Co. v. Stentor Co., 313 U. S. 487, 61 S. Ct. 1020,, 85 L. Ed. 1477, as to contributory negligence, Palmer v. Hoffman, 318 U. S.

109, 117, 63 S. Ct. 477, 482, 87 L. Ed. 645, 144 A.L.R. 719. And see Sampson v. Channell, 1 Cir., 110 F. 2d 754. Erie R. Co. v. Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts.' 326 U. S. at 109, 110, 65 S. Ct. at 1470.

"[2] If the complaint in the present case had been filed in a State court of Kentucky more than one year after the cause of action arose, it would have been barred by the Kentucky one-year statute of limitations, under the 1942 revision of KRS 413.320 as interpreted by the Kentucky Court of Appeals, Wethington v. Griggs, supra, 392 S. W. 2d 56. The same result must be reached by this court in a diversity case arising in Kentucky. Woods v. Interstate Realty Co., 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524; Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832."

The cases cited by the petitioner are not in point. In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 682, footnote 9 noted specifically as follows:

"Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy were still available to the plaintiff, there would be no denial of due process in that regard."

See also *Patterson* v. *Hardin* (S. D., Ind.), 145 F. Supp. 299, 306. In this case, since the passage of KRS

413.320 in 1942, there had been no Court of Appeals decision construing it except by dicta in the *Ley* case, *supra,* in 1954 which was in accordance with the ultimate holding in the *Seat* and *Wethington* cases to the effect that the law of the forum would apply (the Kentucky one-year statute of limitations) and not the two-year statute of limitations of the foreign state where the cause of action arose. Thus, here, the footnote in the *Brinkerhoff* case is clearly applicable and distinguishes the present situation from the situation in the *Brinkerhoff* case.

Bouie v. *City of Columbia,* 378 U. S. 347 is not applicable for the same reason. There had been no Kentucky decision directly on the point since the enactment of the statute in 1942. The *Ley* decision, *supra,* 1957, contained dictum to the contrary. Judge Brooks recognized this fact in the *Albanese* case, *supra,* 335, where he stated, in 1954, that in view of the *Ley* case, he was satisfied that the Kentucky Court of Appeals would construe KRS 413.320 to hold that the law of the forum would apply and the shorter Kentucky Statute of Limitations would be applicable rather than a longer foreign state statute of limitations. Thus, there was ample warning that the Sixth Circuit decisions would not be followed by the Kentucky Court of Appeals.

Thus, simply, in this case the Kentucky Court of Appeals as specifically pointed out in the *Seat* case, is announcing the law under the statute as amended in 1942 and in effect since 1942. All decisions overruled by it were decided by that court prior to 1942 and re-

fore the amendment in KRS 413.320. Thus, we have an entirely different situation than is present in the *Bouie* case.

Knapp-Monarch Co. v. *Casco Products Co.*, 342 F. 2d 622, 627, is not in point for all this case decides is that the plaintiff there was precluded from using violations alleged to have occurred after the filing of the Complaint as evidence of the charges contained therein. This is a patent infringement case and certainly has nothing to do with a diversity of citizenship case to be determined by state law as we have here.

John W. Sohn v. *Waterson,* 84 U. S. 596, 21 L. Ed. 737 is not in point because the statute involved was enacted in 1942 and has been in effect ever since. Moreover, as pointed out at page 600 in the *Sohn* case, there was no decisive construction of the state court on the point. In this case, we do have such a construction.

Safarik v. *Udall,* 304 F. 2d 944, is not in point for there were no previous decisions by the Kentucky Court of Appeals since 1942 construing KRS 413.320 since its amendment and re-enactment in 1942, and the dictum in the *Ley* case is just the opposite from the the conclusion here contended for by petitioner. No contracts were entered into of any kind, nor leases entered into upon the basis of the Kentucky decisions as was done in the *Safarik* case.

Under the cases above cited in applying the *Erie Doctrine* case, *supra,* the District Court, as well as the Court of Appeals, had to determine the law of Kentucky at the time of its decision. There is no argu-

ment made that they did not so correctly determine that law. In Kentucky, since the enactment of the statute was in 1942, the *Seat* and *Wethington* cases were given retroactive, as well as prospective operation. If this case had been filed in a Kentucky court, it would have been dismissed because it was brought in violation of the statute of limitations of the law of the forum (Kentucky). The Sixth Circuit correctly concluded that in view of this fact under the law announced in this court in *Wells* v. *Simonds Abrasive Company*, 345 U. S. 514 and *Guaranty Trust Company* v. *York*, 326 U. S. 99; *Angel* v. *Bullington*, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832; *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 that the Trial Court correctly sustained the defense of the statute of limitations and dismissed the action.

CONCLUSION.

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, John P. Sandidge, Counsel for Schmutz Manufacturing Company, Inc., Respondent, in the matter styled "Donald L. Atkins v. Schmutz Manufacturing Co., Inc.", do hereby certify that I served a true copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the Petitioner on Aug. 23, 1967, by depositing same in a United States mailbox, with first class air mail postage prepaid, addressed to Frank C. Maloney, III, Second Floor Massey Building, Fourth and Main Streets, Richmond, Virginia, 23219, Counsel of record for the Petitioner.

John P. Sandidge.